87-2131

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

LEE HERBERT WALDHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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II. QUESTIONS PRESENTED

A. May an electronic search warrant issued on a resident telephone facility within the territorial jurisdiction of the issuing judge be lawfully executed by law enforcement authorities by recording electronically intercepted communications outside the territorial jurisdiction of the issuing judge.

B. Is the territorial jurisdiction of the judge authorizing an electronic surveillance and interception of oral and wire communications a "core concern" of Congress in enacting Title III which, if exceeded, triggers the statutory exclusionary provisions of 18 U.S.C. §2518(10).

III. LIST OF PARTIES

All parties to the cause of action are included in the caption.

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VI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LEE HERBERT WALDHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

The Petitioner, LEE HERBERT WALDHART, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on direct appeal, United States of America v. Lee H. Waldhart, 837 F.2d 1519 (11th Cir. 1988).

VII. OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit on direct appeal is cited, United States v. Nelson [et al.], 837 F.2d 1519 (11th Cir. 1988).

VIII. JURISDICTION

The case originated as a criminal prosecution in the United States District Court, Northern District of Florida. Upon conviction, direct appeal of the final order, judgment and sentence, was timely prosecuted to the United States Court of Appeals, Eleventh Circuit, pursuant to 28 U.S.C. §1291. The oral argument panel affirmed with an opinion on 25 February 1988, United States v. Nelson [et al.], 837 F.2d 1519 (11th Cir. 1988). Petition for rehearing and suggestion for en banc consideration were timely filed and later denied on 22 April 1988. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

IX. STATUTES INVOLVED

A. Wire Interception and Interception of Oral Communications, 18 U.S.C. §2510, et seq.

18 U.S.C. §2518. Procedure for interception of wire or oral communications:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that--[1] (emphasis added)

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[1] Amended Pub. L. 99-508, §106(a) added "(and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)" following "judge is sitting." The statute now reads:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction),

(Footnote Continued)

B. Security of Communications Act, §934 Fla. Stat.

§934.09 Fla. Stat. (1985). Procedure for interception of wire or oral communications:

> (3) Upon such application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception or wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting if the judge determines on the basis of the facts submitted by the applicant that--

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(Footnote Continued)

> if the judge determines on the basis of the facts submitted by the applicant that--

X. STATEMENT OF THE CASE

A. Operative Facts

In this case the state court territorial jurisdiction lines coincide with federal court territorial jurisdiction lines. The state circuit judge who issued the wiretap order resided in, and was sitting at the time of issuance, in the Fourth Judicial Circuit, Duval County, Florida. The Fourth Judicial Circuit of Florida is wholly within the federal territorial boundaries of the Middle District of Florida. The electronic search was executed and all telephone conversations were recorded in an abutting county, Alachua County, Florida, which is wholly within the Eighth Judicial Circuit of Florida and the Northern District of Florida. The prosecution was commenced in the Northern District of Florida. The state wiretap statute was identical to the then existing federal wiretap statute. The prosecution was instituted in the United States District Court for the Northern District of Florida.

B. Specific Facts

On 07 March 1984 a deputy sheriff of Alachua County, Florida, cross-sworn as a special investigator of the State Attorney's Office of the Fourth Judicial Circuit, obtained authorization from each of the respective state attorneys of the Fourth and Eighth Judicial Circuits of Florida to install a dialed number recorder on the residence of one Frank Guido, who resided in Clay County, Fourth Judicial Circuit, Middle District of Florida. On the same day, state circuit judge Clifford B. Shepard (R11-179) entered an order authorizing the installation of a dialed number recorder (DNR) located on the facility of the residence of Frank Guido, "Route 1 or Route 3, Box 710, Keystone Heights, Clay County, Florida." (Exhibit 2-1), Fourth Judicial Circuit, Middle District of Florida.

Using the information from the DNR's 19 April 1984 both state attorneys authorized the first application to Judge Shepard for a full-scale wiretap (R13-259) on the Guido residence (Exhibit

37; 45). A cross box, or dialed loop extender (transmitter), was installed in Keystone Heights, Clay County, Fourth Judicial Circuit, Middle District of Florida, just down the road from the Guido residence (R18-61, R19-1197). The piece of equipment allowed agents to bridge into Mr. Guido's home telephone and allowed monitoring agents to transmit the audio anywhere in the world (R18-1061). The agents could "either listen to it there, or could -- in this case, we sent it back to Gainesville to be monitored at the narcotics office." Id. The technical name for the equipment is "high piece electronic bridging amplifier." Narcotics agents refer to it as a "slave." The device transmitted electronic or electrical impulses from the Middle District of Florida to the listening post in the Northern District of Florida (R19-191) where the conversations were recorded.

Thereafter using the same method and same procedures a second wiretap was commenced on 25 May 1984 of the Guido residence as well as two

nearby public pay telephone facilities located at the Gizmo Grocery Store at the intersection of Highway 100 and Highway 214, Lake Geneva, Keystone Heights, Clay County, Fourth Judicial Circuit, Middle District of Florida. The pay telephones were the typical coin-operated telephone facilities located adjacent to one another on the outside of the Gizmo Grocery Store accessible to the general public. (See Exhibit 43 and attachments.) Cross boxes for the pay telephone facilities were also located in Clay County, Fourth Judicial Circuit, Middle District of Florida (R19-1198).

Mr. WALDHART was intercepted on 02 and 03 June 1984 on the Guido residence telephone and is an "aggrieved person" as contemplated by 18 U.S.C. §2510(11). A synopsis of the conversation was used for later intercept extensions of the Gizmo pay telephones (Exhibits 41 and 42).

On 22 June 1984 the same state judge under the same circumstances authorized an extension of the wiretap intercept on the Gizmo telephones as

well as a second extension on the Guido phones. The Gizmo taps ran from 25 May through 01 August 1984 (Exhibit 17). The Guido taps ran from 23 April through 21 July 1984.

C. Summary

In summary (R13-465), the judge who issued the order was in Duval County, Middle District of Florida, at all times (R13-465-466). Nowhere in the applications or other paperwork did it indicate that the monitoring activity was going to be accomplished in Gainesville, the Northern District of Florida (R13-466). From inception, the case was a joint federal/state investigation (R17-816). From inception, it was realized the investigation would be multi-state (R17-871). The respective law enforcement agencies had discussions regarding the complications of this multi-circuit, multi-district situation with law enforcement officers from one jurisdiction tapping a telephone located in another jurisdiction (R15-469). However, there was no discussion regarding approaching a justice of the Supreme

Court of Florida, nor the Governor of the State of Florida, nor the Attorney General of the State of Florida (R15-639).

No applications or affidavits were made before an Article III judge or any United States court (R13-464). No application or authorization was signed by any attorney general or deputy attorney general of the United States nor any Assistant United States Attorney General nor any United States Attorney or Assistant Untied States Attorney (R13-464). The record firmly established that Clay County is in the Middle District of Florida (R13-465), and Gainesville is in the Northern District of Florida (R13-465). Clay County, Florida, is in the Fourth Judicial Circuit, and Alachua County is in the Eighth Judicial Circuit of Florida (R13-465). It is a long-distance telephone call from the Guido residence to Gainesville (R13-465). The local narcotics and organized crime unit was responsible for the primary monitoring and was at all times located in Gainesville, Florida. The only

listening post relative the investigation was in Gainesville, Alachua County, Northern District of Florida (R19-1199). There was no listening post in Clay County, Duval County nor any other county in the Middle District of Florida (R19-1199). Clay County Sheriff's officers were not utilized nor were Jacksonville/Duval County officers (R13-391). The State Attorney's Office of the Fourth Judicial Circuit was not used in monitoring the listening post (R13-391).

XI. REASONS FOR GRANTING THE WRIT

A. Importance of Issues Involved

In the decision below the Eleventh Circuit rendered an unwarranted statutory construction in order to save the results of the case. The finding that the "core concern" of Congress was not triggered by the territorial jurisdiction of the authorizing judge flies in the face of both logic and subsequent amendments to Title III of the Omnibus Crime Control and Safe Streets Act.[2]

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[2] 18 U.S.C. §2518(3) provided:

> Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that-- (emphasis added).

With the 1986 amendments to 18 U.S.C. §2510, et seq., 18 U.S.C. §2518(3) was also amended. Par. (3), Pub. L. 99-508, §106(a), added:

> (and outside that jurisdiction but within the United States in the case of a mobile

(Footnote Continued)

If the analysis were correct that the authority to issue a wiretap order is limited only by subject matter jurisdiction , the 1986 amendments to 18 U.S.C. §2518(3) would not have been necessary. But the amendments were necessary so that

> ...in the case of a mobile interception device, a court can authorize an order within its jurisdiction and outside its jurisdiction. This provision applies to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone installed in a vehicle.
>
> In most cases, courts will authorize the installation of a device and the device will be located within the court's jurisdiction....

1986 U.S. Code Cong. & Admin. N. 3584.

The intent of Congress could only have been more plain by inserting the actual adjective "territorial." In a mobile telephone interception case:

(Footnote Continued)
interception device authorized by a Federal court within such jurisdiction)" following "judge is sitting."

> A court can authorize an order within its [territorial] jurisdiction and outside its [territorial] jurisdiction.
>
> In most cases, the courts will authorize the installation of a device and the device will be installed within the court's [territorial] jurisdiction.

Id. The 1986 amendments to the Omnibus Crime and Safe Streets Act did not grant federal courts additional "extra-territorial" jurisdiction in the electronic surveillance of residences or other fixed facilities, only in mobile phones.

The fair reading of the legislative history of the 1986 amendments strengthens the conclusion that the authority to judicially order the interception of private telephone conversations from fixed telephone facilities is limited by the geographical confines of the authorizing judicial officer. An electronic search warrant, like a search warrant for physical or tangible evidence

> ...can only be operative in the territory in respect of which the issuing officer is clothed with judicial authority.

United States v. Strother, 578 F.2d 397, 399 (D.C. Cir. 1978) [construing "territorial jurisdiction"

of the Federal Magistrates Act, 28 U.S.C. §636 (1970)].

> Judges have proverbially signed papers or done other acts outside their territorial jurisdiction which have effect -- and can only have effect -- within those respective jurisdictions.

United States v. Strother, supra., 578 F.2d at 400.

B. Conflict Among the Circuits

The Supreme Court of the United States should grant the Petition for Writ of Certiorari to the Eleventh Circuit to reconcile a conflict between existing case precedent between the courts of appeal of the Fifth and Eleventh Circuits and the Second Circuit. In the opinion below the Eleventh Circuit effectively re-defined the term "intercept" as used in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510-2520, contrary to the language of the statute and existing case law.

The Eleventh Circuit defined "intercept," United States v. Nelson [Waldhart], 837 F.2d at 1526-1527, to mean "the aural acquisition of the

contents of any communication" stating that "interception" refers to the acquisition of the communication as well as the "initial acquisition by the [recording] device and the hearing of the communication by the person or persons responsible for the recording," citing United States v. Turk, 526 F.2d 654 (5th Cir.)[3] cert. denied, 429 U.S. 823, 97 S.Ct. 74; 50 L.Ed.2d 84 (1976), (emphasis by the court). The court concluded that the term "intercept" as it relates to "aural acquisition" refers to the place where the communication is initially obtained regardless of where the communication is ultimately heard. The opinion of the court held in effect that the communications were "intercepted" at the slave transmitter. In

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[3]The Eleventh Circuit is bound by decisions of the former Fifth Circuit rendered prior to 01 October 1981, Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), and by decisions of Unit B of the former Fifth Circuit rendered after that date. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

fact there was no "acquisition," but merely a relaying of the transmission. Both the record and the facts of the case bear this out. Thereafter the court goes on to cite its previous precedent, Adams v. Lankford, 788 F.2d 1493 (11th Cir. 1986), which states that the territorial jurisdiction of the authorizing judge does not implicate the core concerns of Congress in passing Title III. United States v. Nelson [Waldhart], 837 F.2d at 1527. The holdings of both cases should be qualified for reasons stated in Section A, above.

In United States v. Controni, 527 F.2d 708 (2d Cir. 1975), the Second Circuit addressed the issue of tapped conversations which had been seized outside the territorial boundaries of the United States. Part of the conversation had traveled over wire within the United States. The court held that Title III was not implicated because "it is not the route followed by foreign communications which determines the application of Title III; it is where the interception took place." Id. The "interception" or "obtaining"

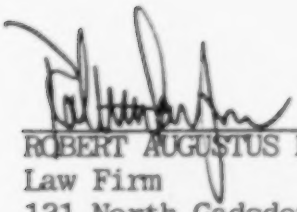
took place in Canada where the conversations were recorded, not over the transmission lines within the United States. Because the conversations were "obtained" outside the territorial boundaries of the United States, Title III was not involved.

In Waldhart the panel has focused on the route of the conversation rather than the point where the communication as actually recorded (or heard). The transmitter or amplifier is not the "device" contemplated in 18 U.S.C. §2510(4), a recorder is. Controni cannot be reconciled against the Waldhart opinion.

XII. CONCLUSION

It is respectfully submitted that not only is the reasoning of the court below unsound, it leads to unworkable results with implications far beyond the specific facts of the case. The likelihood of the appropriate operative procedural facts again coalescing in the foreseeable future is remote. The issue of territorial jurisdiction of the authorizing judge is properly addressed by the Supreme Court. Statutory construction of several key terms of the wiretap statute, "intercept" and "device" being but two, are of national import. The "core concerns" of Congress in drafting the statutory exclusionary language should be visited in future briefs. In sum, the case is procedurally ripe for the Supreme Court to address several key issues of present and future importance to both law enforcement and citizens of the United States.

Respectfully submitted,



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